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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

-----x  
IN THE MATTER OF TERRA FIRMA INVESTMENTS  
(GP) LIMITED (for and on behalf of  
The six limited partnerships  
Constituting the Terra Firma  
Capital Partners II Fund), and  
TERRA FIRMA INVESTMENTS (GP) 3  
LIMITED (for and on behalf of  
Terra Firma Capital Partners  
III, L.P.),

Index No.  
09-CIV-10459

Plaintiffs,

09:04:05 vs.

CITIGROUP INC., CITIBANK  
N.A., CITIGROUP GLOBAL MARKETS  
LIMITED and CITIGROUP GLOBAL  
MARKETS, INC.,

Defendants.

-----x  
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July 30, 2010  
9:10 a.m.

Videotaped Deposition of DAVID J. TEECE,  
taken by Defendants, pursuant to Notice, at the  
offices of Paul, Weiss, Rifkind, Wharton &  
Garrison LLP, 1285 Avenue of the Americas,  
New York, New York, before TAMMEY M. PASTOR, a  
Registered Professional Reporter, Certified  
LiveNote Reporter and Notary Public within and  
for the State of New York.

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09:40:39 2 small caps, there are companies that are traded  
09:40:41 3 that have market caps, you know, less than 100  
09:40:44 4 million. There are companies that are traded  
09:40:46 5 with market caps that are in the multibillions.  
09:40:50 6 I don't necessarily think you get the same  
09:40:52 7 result for every category.

09:40:55 8 Q. Can you cite me to any study for  
09:40:57 9 either large cap companies, small cap companies  
09:40:59 10 or a mixture of the two that stands for the  
09:41:06 11 proposition that auctions typically involve  
09:41:08 12 multiple bidders?

09:41:09 13 MS. DYER: Objection to form.

09:41:23 14 A. And you're not defining auctions  
09:41:25 15 in any particular way, in the most open general  
09:41:27 16 way; is that correct?

09:41:28 17 Q. The same way you use it in your  
09:41:29 18 report.

09:41:41 19 A. I probably use it a little  
09:41:42 20 differently in different places, but as I sit  
09:41:44 21 here right now I can't think of a published  
09:41:48 22 study that deals directly with the point as I  
09:41:57 23 think you're putting it.

09:41:58 24 Q. Could you go back to Exhibit 2,  
09:42:01 25 table 3, the Eckbo study you relied upon?

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09:42:03 2 A. Sure.

09:42:04 3 Q. Would you agree with me that what  
09:42:08 4 this table shows is that single bidders pay a  
09:42:12 5 premium of over 40 percent in successful single  
09:42:17 6 bidder auctions?

09:42:19 7 MS. DYER: Objection to form.

09:42:27 8 A. Pay a premium over what, not over  
09:42:29 9 multiple bidders, but over what the --

09:42:34 10 Q. Well, let me ask you, when you  
09:42:35 11 read this article, sir, to prepare your report,  
09:42:38 12 what did you understand the last column of  
09:42:41 13 table 3 to mean, average offer premium?

09:42:44 14 A. The premium over the price that  
09:42:47 15 was prevailing in the marketplace before the  
09:42:50 16 bidding process got underway.

09:42:52 17 Q. Right. Does Professor -- am I  
09:42:55 18 reading correctly from table 3 in the article  
09:42:57 19 that you reviewed, that Professor Eckbo reports  
09:43:01 20 that in single bidder -- 9,944 single bidder  
09:43:05 21 auctions that he reports on, the average  
09:43:08 22 premium to the share price before the  
09:43:10 23 successful bid is 44.8 percent when there is  
09:43:13 24 only a single bidder?

09:43:14 25 MS. DYER: Objection to the form.

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09:43:20 2 A. That the initial bid was 44.8?

09:43:22 3 Q. Yes.

09:43:23 4 A. Yes. That's correct.

09:43:24 5 Q. Are you aware of any literature  
09:43:25 6 that suggests that single bidder auctions yield  
09:43:30 7 a premium over the prevailing share price of  
09:43:33 8 less than 44 percent?

09:43:34 9 A. First of all you're looking at  
09:43:36 10 the initial bid. Did you mean to focus on the  
09:43:38 11 final bid?

09:43:39 12 Q. I meant to focus on the initial  
09:43:41 13 bid. We can do the question both ways. All  
09:43:44 14 right. What you're pointing out the initial  
09:43:46 15 bid results in a premium of 44.8 percent and  
09:43:49 16 final bid in only a slightly higher bid in a  
09:43:53 17 single auction of 44.5 percent; is that right?

09:43:56 18 A. Well, I am also pointing out that  
09:43:59 19 the ranking changes.

09:44:07 20 Q. The question I am asking you,  
09:44:09 21 sir, is are you aware of any empirical study  
09:44:12 22 that suggests that single bidder auctions do  
09:44:15 23 not yield a premium over the prevailing share  
09:44:20 24 price of at least 40 percent?

09:44:22 25 MS. DYER: Objection to form.

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09:44:23 2 A. When you say single bidder  
09:44:25 3 auctions, you mean auctions that result in a  
09:44:28 4 single bidder?

09:44:28 5 Q. Correct.

09:44:29 6 A. Okay. And the question is, given  
09:44:31 7 that clarification can I have the question  
09:44:33 8 again, please.

09:44:34 9 Q. I will restate the question. In  
09:44:36 10 auctions that result in a single bid, are you  
09:44:38 11 aware of any empirical literature that report a  
09:44:42 12 lower offer premium than 44 percent as reported  
09:44:46 13 by Professor Eckbo in table 3 of the article  
09:44:50 14 that you reviewed in connection with your  
09:44:52 15 report?

09:44:53 16 MS. DYER: Objection to form.

09:44:54 17 A. I think I don't -- you know, the  
09:44:58 18 literature that I found I cited here. The  
09:45:00 19 literature was actually pretty skinny. There  
09:45:02 20 is not a lot of empirical work that's been  
09:45:05 21 done.

09:45:06 22 Q. Is the answer to my question no?

09:45:07 23 A. I'm not aware of any other paper  
09:45:09 24 that provides illumination to the question that  
09:45:14 25 you asked, at least I am not aware as I sit

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09:48:43 2 remember.

09:48:50 3 Q. One of them being the AIG matter?

09:48:52 4 A. Yes.

09:48:52 5 Q. What were the other matters?

09:48:54 6 A. I am trying to think. There was  
09:49:00 7 a matter for Phillip Morris. Oh, there was a  
09:49:13 8 pay phone case. Antitrust case.

09:49:16 9 Q. Any other matters that you can  
09:49:19 10 think of?

09:49:24 11 A. There may have been one that goes  
09:49:26 12 back to the time at Cravath that I worked on  
09:49:31 13 that he was involved in, I don't know whether  
09:49:34 14 it was his matter or not.

09:49:37 15 Q. Are those all that you can  
09:49:39 16 recall?

09:49:39 17 A. Pardon me?

09:49:40 18 Q. Are those all that you can  
09:49:42 19 recall?

09:49:42 20 A. Yes.

09:49:46 21 Q. Do you have any other business  
09:49:47 22 relationships with Mr. Boies or any person or  
09:49:50 23 entity with which he is affiliated?

09:49:52 24 A. No.

09:49:53 25 MS. DYER: Objection to the form.

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09:49:54 2 Q. Do you own a yacht, sir?  
09:49:55 3 A. Yes.  
09:49:56 4 Q. Called The Coconut?  
09:49:57 5 A. Yes.  
09:49:58 6 Q. Does Mr. Boies have an interest  
09:50:00 7 in that boat?  
09:50:01 8 A. No.  
09:50:02 9 Q. Are you aware of any person or  
09:50:05 10 entity affiliated with him?  
09:50:07 11 MS. DYER: Objection to the form.  
09:50:08 12 A. Correct.  
09:50:08 13 Q. Correct, that no person or entity  
09:50:10 14 affiliated with Mr. Boies has an interest in  
09:50:12 15 that yacht?  
09:50:14 16 MS. DYER: Objection to the form.  
09:50:15 17 A. That's correct.  
09:50:20 18 Q. Let's go back if we can to your  
09:50:21 19 report, Exhibit 1 before we look at the text of  
09:50:34 20 your report. You mentioned some documents you  
09:50:37 21 reviewed. Did you interview anyone in  
09:50:39 22 connection with your report?  
09:50:40 23 A. Not personally, no.  
09:50:41 24 Q. Did anyone on your staff  
09:50:42 25 interview anyone in connection with this

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09:50:44 2 report?  
09:50:45 3 A. Yes he.  
09:50:45 4 Q. Who, first of all who conducted  
09:50:47 5 the interviews?  
09:50:48 6 A. Dr. Akemann and Mr. Blair.  
09:50:56 7 Q. Who did Dr. Akemann and Mr. Blair  
09:50:59 8 interview?  
09:51:00 9 A. Guy Hands. There may have been  
09:51:09 10 others, I just don't recall.  
09:51:12 11 Q. Is that the only name you can  
09:51:13 12 recall, Mr. Hands?  
09:51:16 13 A. Yes.  
09:51:17 14 Q. Have you ever spoken to Mr.  
09:51:18 15 Hands?  
09:51:18 16 A. No.  
09:51:19 17 Q. When did -- who interviewed Mr.  
09:51:21 18 Hands; Dr. Akemann or Mr. Blair or both?  
09:51:27 19 A. I don't know for sure. I think  
09:51:28 20 they both did.  
09:51:30 21 Q. Did either Dr. Akemann or Mr.  
09:51:33 22 Blair communicate to you the substance of their  
09:51:35 23 interview with Mr. Hands?  
09:51:43 24 A. Yes.  
09:51:44 25 Q. How did they do that?

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09:51:45 2 A. How did they do that?

09:51:47 3 Q. Yes.

09:51:47 4 A. They talked to me about it.

09:51:48 5 Q. Did they prepare a memorandum of  
09:51:50 6 their interview with Mr. Hands?

09:51:51 7 A. No. Not to my knowledge.

09:51:52 8 Q. Did they take any notes either  
09:51:55 9 Dr. Akemann or Mr. Blair on their interview  
09:51:57 10 with Mr. Hands?

09:51:58 11 A. I don't know.

09:52:00 12 Q. Do you know when the interview of  
09:52:01 13 Mr. Hands took place in relationship to the  
09:52:03 14 preparation of your report, which is dated June  
09:52:05 15 14th, 2010?

09:52:09 16 A. I believe at least one interview  
09:52:15 17 was before the report was finished.

09:52:18 18 Q. Have they interviewed Mr. Hands  
09:52:20 19 more than once?

09:52:22 20 A. I believe so.

09:52:23 21 Q. How many times had they  
09:52:25 22 interviewed him?

09:52:26 23 A. I don't know.

09:52:29 24 Q. Have they interviewed him  
09:52:30 25 subsequent to the preparation of your report?

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09:52:31 2 A. I believe they interviewed him  
09:52:34 3 twice, I don't remember whether they were both  
09:52:36 4 before or whether one was before and one was  
09:52:40 5 after.

09:52:41 6 Q. Tell me everything that you can  
09:52:43 7 recall that either Dr. Akemann or Mr. Blair  
09:52:47 8 told you about their interviews with Mr. Hands.

09:52:53 9 A. Well, you know, I subsequently  
09:52:56 10 read Mr. Hands' deposition. And I don't want  
09:53:05 11 to -- I might confuse to some extent what I've  
09:53:10 12 learned from conversations versus what's in the  
09:53:13 13 deposition. But with that caveat, you know, I  
09:53:18 14 certainly had conveyed to me the same responses  
09:53:27 15 that I saw in the deposition.

09:53:32 16 I think in addition to that, I  
09:53:43 17 think he mentioned in the context of a Warner  
09:53:49 18 bid that, you know, he wouldn't necessarily, if  
09:53:59 19 Warner initiated a bid, he wouldn't necessarily  
09:54:02 20 want to follow that situation because Warner  
09:54:04 21 was in a different competitive position as a  
09:54:08 22 strategic than Terra Firma was.

09:54:16 23 Q. What specifically did Mr. Blair  
09:54:20 24 or Dr. Akemann tell you that they learned from  
09:54:24 25 Mr. Hands?

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09:54:26 2 MS. DYER: Objection to the form.  
09:54:33 3 A. Well that, as I say, this may  
09:54:35 4 have morphed in my mind with what I read in the  
09:54:38 5 deposition, but that he was told by Wormsley  
09:54:44 6 that Cerberus was going to bid initially. And  
09:54:59 7 he reiterated that later so he was told at  
09:55:14 8 least twice that Cerberus was going to bid and  
09:55:16 9 the price was understood. And he never got any  
09:55:28 10 disconfirmation of that, Mr. Wormsley did not  
09:55:31 11 call him to tell him that wasn't the case.

09:55:34 12 Q. Anything else that you recall  
09:55:37 13 either Dr. Akemann or Mr. Blair telling you  
09:55:40 14 about their interview or interviews of Mr.  
09:55:43 15 Hands?

09:55:51 16 A. That he had been sort of looking  
09:55:54 17 off and on at Terra Firma for a dozen or so  
09:56:01 18 years.

09:56:03 19 Q. Do you mean to say EMI, sir? You  
09:56:06 20 said Terra Firma.

09:56:06 21 A. Sorry. EMI. Sorry, that Terra  
09:56:09 22 Firma -- well, that, you know, Mr. Hands had  
09:56:11 23 been if you will, reviewing the opportunity off  
09:56:18 24 and on over a 10-year period.

09:56:27 25 That they wouldn't have bid but

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09:56:39 2 for reliance on what Wormsley told him.

09:56:46 3 Q. Do you have a specific  
09:56:47 4 recollection of either Mr. Blair or Dr. Akemann  
09:56:51 5 telling you that Mr. Hands told them that he  
09:56:56 6 would not have bid but for what he was told by  
09:56:58 7 Mr. Wormsley?

09:57:01 8 A. Do I have a specific recollection  
09:57:02 9 of that?

09:57:03 10 Q. Yes.

09:57:07 11 A. Yes.

09:57:10 12 Q. Did either Mr. Blair or  
09:57:15 13 Dr. Akemann try to ascertain from Mr. Hands  
09:57:21 14 whether there were any other reasons why he  
09:57:24 15 committed billions of dollars of equity to an  
09:57:28 16 acquisition other than information conveyed by  
09:57:30 17 Mr. Wormsley?

09:57:32 18 MS. DYER: Objection to the form.

09:57:49 19 A. Can I have that read back.

09:57:50 20 (The pending question was read as  
09:57:50 21 follows:

09:57:10 22 "Question: Did either Mr.  
09:57:14 23 Blair or Dr. Akemann try to ascertain from Mr.  
09:57:20 24 Hands whether there were any other reasons why  
09:57:23 25 he committed billions of dollars of equity to

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09:57:28 2 an acquisition other than information conveyed  
09:57:30 3 by Mr. Wormsley?"

09:57:51 4 MS. DYER: Same objection.

09:57:53 5 A. Can you clarify what you mean by  
09:57:54 6 that question?

09:57:55 7 Q. Did Dr. Akemann or Mr. Blair ask  
09:57:59 8 Mr. Hands whether anything other than Mr.

09:58:03 9 Wormsley's statements played a role in Mr.

09:58:07 10 Hands' decision to go forward with the EMI

09:58:09 11 transaction?

09:58:19 12 A. Well, as I said before, what I  
09:58:22 13 understood him to say that he wouldn't have  
09:58:23 14 made the bid, but for the information that was  
09:58:31 15 conveyed by Wormsley. That doesn't mean to say  
09:58:34 16 that that's all the information that he had in  
09:58:42 17 mind when he made the bid. You know, obviously  
09:58:47 18 he had studied the target, invested  
09:58:54 19 considerable time over the years in due  
09:58:57 20 diligence, was intrigued by the target, you  
09:59:03 21 know, thought there may be an opportunity. But  
09:59:05 22 was also highly aware of the risk.

09:59:12 23 And the fact that this was a  
09:59:16 24 marketplace that was difficult with music  
09:59:20 25 piracy and other developments in the industry.

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09:59:22 2 Q. Right. You and I have spent some  
09:59:25 3 time on that marketplace before; have we not?  
09:59:26 4 A. Indeed.  
09:59:30 5 Q. Do you recall -- do you know  
09:59:32 6 whether Mr. Blair and Dr. Akemann have notes of  
09:59:34 7 their conversations with Mr. Hands?  
09:59:36 8 A. I don't know.  
09:59:37 9 Q. Have you asked them?  
09:59:38 10 A. No.  
09:59:42 11 Q. You've never seen the notes?  
09:59:43 12 A. No.  
09:59:44 13 Q. And they never communicated to  
09:59:47 14 you the substance of their interview of Mr.  
09:59:50 15 Hands in writing?  
09:59:51 16 A. Correct.  
09:59:54 17 Q. Do you know whether anyone else  
09:59:56 18 was spoken to employed by Terra Firma?  
10:00:03 19 MS. DYER: Objection to form,  
10:00:04 20 but --  
10:00:05 21 Q. Let me ask a better question.  
10:00:05 22 I'll ask a better question. Withdrawn.  
10:00:07 23 Do you know whether anyone on  
10:00:09 24 your staff interviewed anyone at Terra Firma,  
10:00:12 25 other than Mr. Hands?

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10:00:21 2 A. I don't know for sure.  
10:00:22 3 Q. Do you know whether anyone on  
10:00:23 4 your staff interviewed anyone at Cerberus?  
10:00:25 5 A. I don't believe they did.  
10:00:29 6 Q. Do you know whether anyone on  
10:00:30 7 your staff interviewed anyone at One Equity  
10:00:33 8 Partners?  
10:00:34 9 A. I don't believe they did.  
10:00:35 10 Q. Do you know whether anyone on  
10:00:36 11 your staff interviewed anyone at Fortress?  
10:00:39 12 A. I don't believe they did.  
10:00:40 13 Q. Do you know whether anyone on  
10:00:43 14 your staff interviewed anyone at Warner Music?  
10:00:45 15 A. I don't know whether they did.  
10:00:46 16 Q. Do you know whether anyone on  
10:00:48 17 your staff interviewed anyone who was formerly  
10:00:50 18 employed by Citibank?  
10:00:51 19 A. I don't believe they did.  
10:00:56 20 Q. Do you know whether anyone on  
10:00:57 21 your staff interviewed anybody who had been  
10:00:59 22 employed by EMI?  
10:01:02 23 MS. DYER: Objection to form.  
10:01:09 24 A. I don't know for sure.  
10:01:13 25 Q. Do you have any reason to believe

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10:01:14 2 anyone was interviewed by your staff other than  
10:01:18 3 Mr. Hands?

10:01:23 4 A. I don't know.

10:01:25 5 Q. Meaning as you sit here today you  
10:01:27 6 can't think of anyone else?

10:01:28 7 A. I can't think of a name.

10:01:30 8 Q. Do you believe there is a person  
10:01:33 9 or you're not aware of anyone?

10:01:35 10 MS. DYER: Objection to the form.

10:01:38 11 A. I don't know. There may or may  
10:01:40 12 not have been, I just don't recall.

10:01:42 13 Q. How would you refresh your  
10:01:44 14 recollection as to that?

10:01:46 15 A. I'd ask them if I wanted to.

10:01:51 16 Q. Turn to paragraph 32 your report,  
10:01:53 17 Exhibit 1, sir. It is on page 9. Back in the  
10:02:13 18 front.

10:02:16 19 MS. DYER: It is way towards the  
10:02:18 20 front.

10:02:22 21 A. Okay.

10:02:24 22 Q. And you say in the first sentence  
10:02:25 23 of paragraph 32. "I have been asked to assume  
10:02:28 24 for purposes of my analysis that the alleged  
10:02:30 25 fraud occurred."

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10:02:32 2 Do you see that, sir? Just let me  
10:02:39 3 know when you get there. I am sure Ms. Dyer  
10:02:41 4 can help you.

10:02:42 5 MS. DYER: Paragraph 32, I believe  
10:02:43 6 right.

10:02:44 7 Q. Paragraph 32.

10:02:48 8 MS. DYER: Paragraph 32 which is  
10:02:49 9 over on page 9. You could get a little  
10:02:53 10 bit bigger paragraph numbers, we are blind  
10:02:56 11 these days.

10:02:57 12 A. Got it.

10:02:58 13 Q. All right. You said "I have been  
10:03:00 14 asked to assume for purposes of my analysis  
10:03:02 15 that the alleged fraud occurred."

10:03:04 16 Do you see that, sir?

10:03:05 17 A. Yes.

10:03:05 18 Q. Was that true when you wrote  
10:03:06 19 that?

10:03:17 20 A. Yes. And it ties in, I am quite  
10:03:24 21 explicit about my assumptions there and below.

10:03:27 22 Q. Yes. And my question, sir, is  
10:03:29 23 are you offering any independent opinion today  
10:03:34 24 as to whether a fraud occurred or is it simply  
10:03:37 25 an assumption you've been instructed to make?

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10:53:46 2 Q. No. I'm referring to the common  
10:53:48 3 share price of EMI.

10:53:59 4 A. Well, I think it depends on  
10:54:01 5 whatever deal was structured and the terms upon  
10:54:04 6 which they -- and the terms upon which that  
10:54:07 7 structuring was done.

10:54:08 8 Q. Did you review the Greenhill  
10:54:10 9 analysis of what impact a securitization of the  
10:54:13 10 music publishing business would have had on  
10:54:15 11 EMI's share price?

10:54:16 12 A. I believe I seen something in the  
10:54:22 13 record, I don't recall whether it was  
10:54:24 14 Greenhill's or somebody else's or EMI's.

10:54:27 15 Q. Don't you recall that Greenhill  
10:54:28 16 concluded that a securitization of the EMI's  
10:54:32 17 music publishing business would have lifted the  
10:54:34 18 share price?

10:54:35 19 MS. DYER: Objection to the form.

10:54:38 20 A. That's not inconsistent with what  
10:54:41 21 I've seen, but I'm not sure if I remember that  
10:54:44 22 specific conclusion.

10:54:46 23 Q. Stay on page 60 of your report  
10:54:48 24 that we're open to under Damages. Look at  
10:54:53 25 footnote 249. "I have used Ms. DeMario's

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10:54:56 2 analysis of the fair market value of EMI in my  
10:54:58 3 damages analysis."

10:55:00 4 Do you see that, sir?

10:55:01 5 A. Yes.

10:55:01 6 Q. Have you conducted any  
10:55:03 7 independent verification of Ms. DeMario's work?

10:55:07 8 A. No. I have not calculated any  
10:55:11 9 numbers of my own. I have reviewed, in general  
10:55:15 10 terms what she's done and looked at the results  
10:55:20 11 relative to other measures of value.

10:55:23 12 Q. Have you tested Ms. DeMario's  
10:55:25 13 assumptions?

10:55:26 14 MS. DYER: Objection to form.

10:55:28 15 A. No, as I said, I didn't, did not  
10:55:32 16 go in and check her analysis.

10:55:38 17 Q. Does your damages calculation  
10:55:40 18 depend upon Ms. DeMario's calculation of the  
10:55:44 19 equity value of EMI at various points in time?

10:55:47 20 A. Yes. As you can see from the  
10:55:52 21 tables, I take from her analysis data that  
10:55:59 22 rolls into my damages analysis.

10:56:02 23 Q. Okay. Let's actually since  
10:56:03 24 you're turning there, I will turn there with  
10:56:05 25 you. Let's turn to attachment D which is

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10:56:11 2 entitled Total Damages Under New York Law Using  
10:56:14 3 May 2007 Values.

10:56:16 4 Do you see that, sir, Attachment  
10:56:22 5 D as in David. It will be after the list of  
10:56:26 6 documents you reviewed?

10:56:29 7 I apologize we don't have tabs on  
10:56:31 8 that. It would make it easier. Maybe Ms. Dyer  
10:56:35 9 can help you.

10:56:35 10 MS. DYER: I can probably find it.

10:56:36 11 It will take me a moment. It is the start  
10:56:38 12 of this section I believe where we are  
10:56:40 13 going, so it is right here.

10:56:43 14 A. I was in Attachment D.

10:56:45 15 MS. DYER: You were there.

10:56:47 16 A. Which page?

10:56:47 17 Q. Let's start with Exhibit 1, Total  
10:56:50 18 Damages Under New York Law. Do you see that?

10:56:51 19 A. Yes.

10:56:52 20 Q. You made some assumptions about  
10:56:53 21 New York law; is that correct?

10:56:54 22 A. Yes.

10:56:55 23 Q. As you point out you're not a  
10:56:56 24 lawyer; right?

10:56:57 25 A. That's correct.

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10:56:57 2 Q. You've simply been asked to  
10:56:58 3 perform some calculations based on some  
10:57:01 4 instructions about what New York law provides;  
10:57:03 5 correct?

10:57:03 6 A. That is correct.

10:57:04 7 Q. Okay. The out-of-pocket damages  
10:57:07 8 that you calculate, on Exhibit 1, more  
10:57:12 9 specifically in Exhibit 1A, are essentially the  
10:57:17 10 difference between the equity value received by  
10:57:23 11 Terra Firma Capital Partners Funds in May 2007  
10:57:25 12 and the equity value that those funds retain  
10:57:33 13 today?

10:57:34 14 MS. DYER: Objection to the form.

10:57:35 15 You can answer.

10:57:36 16 Q. Let me rephrase the question.

10:57:37 17 The out-of-pocket damages that you calculate in  
10:57:40 18 Exhibit 1A are the difference between what the  
10:57:43 19 plaintiffs paid for their equity value in Terra  
10:57:46 20 Firma and the value of the equity as of May of  
10:57:50 21 2007; is that right?

10:57:53 22 A. In essence, that's correct.

10:57:54 23 Q. The equity value that makes up  
10:57:57 24 this damages calculation was calculated by  
10:58:02 25 Ms. DeMario; correct?

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10:58:07 2 A. Yes.

10:58:07 3 Q. You did not do anything to value

10:58:12 4 the EMI equity as of May 2007; did you?

10:58:14 5 MS. DYER: Objection to the form.

10:58:16 6 A. Did not do anything to value it?

10:58:20 7 I took into my analysis Ms. DeMario's numbers.

10:58:24 8 Q. Right. But the out-of-pocket

10:58:26 9 damages number is the difference in colloquial

10:58:29 10 terms between what the Plaintiffs paid and the

10:58:32 11 value of what they received in May of 2007;

10:58:36 12 right?

10:58:36 13 A. With respect to equity, that's

10:58:37 14 correct.

10:58:38 15 Q. Right. And all you're doing here

10:58:41 16 is subtraction; isn't that correct?

10:58:44 17 A. That is correct.

10:58:46 18 Q. And then you take the subtraction

10:58:49 19 and convert it into euros at a stated exchange

10:58:54 20 rate; correct?

10:58:55 21 A. That is correct.

10:58:56 22 Q. How long did that exercise take

10:58:57 23 you that's reflected in Exhibit 1A?

10:59:03 24 MS. DYER: Just for this exhibit?

10:59:04 25 Q. Yes.

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10:59:09 2 A. Well, you know, it was part of a  
10:59:10 3 multifaceted spreadsheet analysis. You know,  
10:59:15 4 one had to first of all set it up. Once you  
10:59:17 5 got it set up doing the particular calculations  
10:59:21 6 of course is instantaneous.

10:59:23 7 Q. But the damages number that you  
10:59:29 8 set out in Exhibit 1A depends entirely on the  
10:59:32 9 value of the equity calculated by Ms. DeMario;  
10:59:35 10 isn't that so?

10:59:35 11 A. That is correct.

10:59:36 12 Q. You're not offering any  
10:59:37 13 independent verification of her analysis as to  
10:59:40 14 the equity value; are you?

10:59:45 15 A. No, although I do note that her  
10:59:47 16 numbers are not out of line with some of the  
10:59:51 17 Greenhill analysis that was done about at the  
10:59:58 18 same time.

10:59:58 19 Q. Did you do any empirical work to  
11:00:00 20 support the number for equity value arrived at  
11:00:04 21 by Ms. DeMario?

11:00:05 22 A. No.

11:00:06 23 Q. Turn to Exhibit 1B, please, that  
11:00:12 24 is Consequential Damages.

11:00:14 25 A. Yes.

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11:00:15 2 Q. Let's go back to 1A. Sorry, sir,  
11:00:17 3 go back to 1A. What does the term equity value  
11:00:20 4 mean set out on Exhibit 1A?

11:00:25 5 A. Equity value is typically the  
11:00:26 6 enterprise value minus the debt.

11:00:28 7 Q. What's the relationship between  
11:00:31 8 equity value and fair market value?

11:00:32 9 MS. DYER: Objection to the form.

11:00:35 10 Q. If any.

11:00:36 11 A. Between equity value and fair  
11:00:37 12 market value?

11:00:38 13 Q. Yes.

11:00:39 14 A. You mean in an accounting sense?

11:00:40 15 Q. No. How does the equity value  
11:00:47 16 that you use on Exhibit 1A compare with the  
11:00:51 17 fair market value of EMI?

11:00:54 18 MS. DYER: Hold on. Objection to  
11:00:59 19 the form.

11:00:59 20 A. What Ms. DeMario was calculating  
11:01:01 21 was what she determined was fair market value.  
11:01:05 22 The way she calculated it was to calculate an  
11:01:08 23 equity value based on EMI's forecasts. And  
11:01:15 24 their own books and records.

11:01:17 25 Q. Prior to the preparation of

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11:07:56 2 calculations that are reflected here were a  
11:07:58 3 series of assumptions with respect to damages  
11:08:01 4 that were given to you by counsel; correct?

11:08:05 5 A. That is correct with the  
11:08:07 6 exception of lost profits damages, where I  
11:08:14 7 determined an appropriate measure of historical  
11:08:22 8 return was to use an IRR.

11:08:24 9 Q. We'll come to that. Let's look at  
11:08:27 10 Exhibit 2A in Attachment D which is make whole  
11:08:33 11 damages under English law. Do you see that?

11:08:34 12 A. Yes.

11:08:39 13 Q. Am I correct what you reflect in  
11:08:42 14 Exhibit 2A is the difference between the  
11:08:44 15 amounts invested by the Plaintiffs and the  
11:08:47 16 present value of EMI equity?

11:08:51 17 A. Yeah, where present value refers  
11:08:53 18 to current value basically.

11:08:54 19 Q. June 2010. Not present value in  
11:08:56 20 some other sense; right?

11:08:57 21 A. Correct. Current value may be a  
11:08:59 22 better term.

11:09:00 23 Q. Okay. And the current value of  
11:09:02 24 the EMI equity of 234.4 million euros, that's a  
11:09:11 25 number that you did not calculate; correct?

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11:09:16 2 A. Once again this is derived from  
11:09:19 3 Ms. DeMario's analysis and calculations.

11:09:23 4 Q. Right. Did you do anything with  
11:09:25 5 respect to the current value of the equity of  
11:09:28 6 EMI to verify the calculations made by  
11:09:31 7 Ms. DeMario?

11:09:33 8 MS. DYER: Objection to the form.

11:09:34 9 A. Not beyond what I have already  
11:09:36 10 testified to.

11:09:41 11 Q. Did you test any of the  
11:09:41 12 assumptions in her valuation model?

11:09:49 13 A. Not directly, no.

11:09:50 14 Q. Did anyone ever show you any  
11:09:53 15 valuations done by the fund with respect to the  
11:10:01 16 funds' view of the current value of EMI?

11:10:03 17 MS. DYER: Objection to the form.

11:10:09 18 A. I believe I did see some  
11:10:10 19 valuations done by the fund.

11:10:12 20 Q. Were the valuations by the fund  
11:10:14 21 as to current value higher or lower than the  
11:10:17 22 numbers that are set out on Exhibit 2A?

11:10:23 23 A. I believe they were higher.

11:10:25 24 Q. And is it an impairment analysis  
11:10:30 25 that you looked at?

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11:10:34 2 A. I forget the name of the  
11:10:35 3 document.

11:10:37 4 Q. Did you see the document you're  
11:10:38 5 referring to prior to submission of your Expert  
11:10:44 6 Report?

11:10:44 7 A. I don't recall for sure. I was  
11:10:45 8 aware that Terra Firma had some valuations  
11:10:51 9 based on what they thought they could do with  
11:10:53 10 the asset that were higher than Ms. DeMario's.

11:10:58 11 Q. Did you have any conversation  
11:10:59 12 with Ms. DeMario prior to the submission of  
11:11:02 13 your Expert Report contained in Exhibit 2A as  
11:11:08 14 to what impact, if any, the funds' own  
11:11:11 15 valuation had on her work?

11:11:16 16 A. I did understand that she was  
11:11:17 17 looking at the asset sort of on a stand-alone  
11:11:22 18 basis and not taking into account the full  
11:11:28 19 measure of what a buyer might do to improve the  
11:11:34 20 asset.

11:11:38 21 You know, her definition of fair  
11:11:39 22 market value, which I think is, you know, is  
11:11:45 23 consistent with what's in the literature on  
11:11:48 24 fair market value is clear. What some people  
11:11:55 25 call investment value, which is -- which can be

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11:56:07 2 of them, but I have not studied them in any  
11:56:10 3 detail.

11:56:10 4 Q. Other than Odeon can you name  
11:56:12 5 any?

11:56:12 6 A. No. Most of them are not sort of  
11:56:14 7 high profile companies they are public names.

11:56:18 8 Q. I am just asking you if you can  
11:56:21 9 name them?

11:56:21 10 A. As I sit here now, no.

11:56:23 11 Q. Can you tell me how you used the  
11:56:25 12 data that is set out in Dolenec Exhibit 34 to  
11:56:27 13 calculate the IRR of 43.66 percent?

11:56:30 14 A. Yes. Basically, as you probably  
11:56:34 15 know, an IRR calculation involves inputting all  
11:56:40 16 the cash flows that come in, as well as the  
11:56:45 17 cash flows that come out.

11:56:52 18 And what I have done, which I  
11:56:55 19 think is conservative, I have excluded value  
11:56:59 20 that's not been realized.

11:57:06 21 And then the, you know, a DCF,  
11:57:09 22 fundamentally -- excuse me, an IRR  
11:57:12 23 fundamentally assumes, you know, reinvestment  
11:57:15 24 of cash flows to calculate a, to simultaneously  
11:57:20 25 calculate an internal rate of return number.

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11:57:23 2 Which is, you know, one of them measures that  
11:57:26 3 economists frequently use to look at the  
11:57:28 4 performance of investments.

11:57:30 5 Q. The calculation that you just  
11:57:31 6 mentioned, did you perform that calculation or  
11:57:33 7 did someone on your staff do it?

11:57:34 8 A. No, my staff did that.

11:57:36 9 Q. Did you audit it?

11:57:37 10 A. Personally?

11:57:38 11 MS. DYER: Objection to the form.

11:57:39 12 Q. Yes.

11:57:44 13 A. No. I didn't personally audit.

11:57:46 14 Other than in the sense of discussing it with  
11:57:49 15 Mr. Blair who led this part of the analysis to  
11:57:53 16 make sure that he understood the key elements  
11:58:01 17 of the exercise.

11:58:03 18 Q. Did you calculate for any Terra  
11:58:06 19 Firma fund its internal rate of return on  
11:58:10 20 investments other than EMI between May 21, 2007  
11:58:14 21 and June 1, 2010?

11:58:19 22 A. Can I have that read back.

11:58:20 23 Q. Let me ask you a different  
11:58:21 24 question. The internal rate of return you  
11:58:23 25 calculated 43.66 percent, over what period of

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11:58:26 2 time was that calculated?

11:58:29 3 A. Well I think judging by the data  
11:58:31 4 here, the first entry was an investment in  
11:58:34 5 Phoenix Inns in August of '95. So it would be  
11:58:45 6 from '95 through December of '09 was the last  
11:58:55 7 cash entry.

11:58:58 8 Q. So, is it your understanding that  
11:58:59 9 the historical IRR that you've set out of 43.66  
11:59:06 10 percent is the historical IRR in the period  
11:59:10 11 August 1995 through December 2009 over the  
11:59:14 12 entire period?

11:59:15 13 A. Yes. Putting unrealized  
11:59:19 14 investments to one side.

11:59:23 15 Q. Did you make any effort to  
11:59:24 16 separately calculate the IRR earned by any of  
11:59:30 17 the Terra Firma funds between May 21, 2007, the  
11:59:34 18 first date that you've listed here on  
11:59:38 19 Exhibit 2C and June 1 of 2010?

11:59:46 20 A. What was the first date you  
11:59:48 21 mentioned?

11:59:50 22 Q. May 21, 2007.

11:59:51 23 A. Yes.

11:59:52 24 Q. It comes from line E, row E. I  
11:59:56 25 am always confused between rows and columns. I

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11:59:58 2 think it is a row. Row E of Exhibit 2C.

12:00:03 3 A. Can I have the question again.

12:00:05 4 Q. Yes. I'll ask you the question

12:00:05 5 again. Did you make any separate calculation

12:00:07 6 of the internal rate of return that has been

12:00:09 7 realized by the Terra Firma funds since May 21,

12:00:14 8 2007?

12:00:15 9 A. No.

12:00:15 10 Q. Is it your expert opinion that

12:00:22 11 had Terra Firma not bought EMI, it would have

12:00:27 12 earned a rate of return between May 21, 2007

12:00:31 13 and today at a rate of 43.66 percent?

12:00:39 14 A. Is it my expert opinion that is  
12:00:41 15 what they would have earned?

12:00:42 16 Q. Yes.

12:00:43 17 A. What I'm doing here is  
12:00:46 18 calculating their historical return over the  
12:00:55 19 observable history of their investments. To me  
12:01:00 20 that's the best measure I can think of for  
12:01:04 21 coming up with an estimate of lost profits.

12:01:09 22 Q. My question is slightly  
12:01:10 23 different. Are you offering an opinion as to  
12:01:15 24 what rate of return Terra Firma would have  
12:01:17 25 earned from May 21, 2007 to June 1, 2010 had it

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12:01:24 2 not invested in EMI?

12:01:27 3 MS. DYER: Objection, asked and  
12:01:27 4 answered.

12:01:28 5 A. I don't think I'm offering that  
12:01:29 6 opinion. I'm telling you how I calculated the  
12:01:33 7 historic return, which is what I understand  
12:01:37 8 under the law is the criteria that can be used  
12:01:41 9 for determining lost profits.

12:01:43 10 Q. Were you instructed in your lost  
12:01:44 11 profits calculation to use a historic rate of  
12:01:50 12 return going back to 1995?

12:02:01 13 A. I don't think the mandate was  
12:02:03 14 that specific.

12:02:06 15 Q. Do you understand -- sorry, I  
12:02:08 16 didn't mean to cut you off, sir.

12:02:10 17 A. I understood the mandate was to  
12:02:13 18 use past performance as an appropriate measure.  
12:02:18 19 And my job was to figure out what is the best  
12:02:20 20 measure of past performance.

12:02:21 21 Q. Did you not understand -- what do  
12:02:24 22 the words lost profits mean to an economist  
12:02:27 23 such as you?

12:02:28 24 A. At a general level, you know,  
12:02:33 25 lost profits are in the but-for world what

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12:02:41 2 would you have made on the asset or on the, in  
12:02:47 3 this case, on the funds, what might you have  
12:02:50 4 made on the funds that were deployed one way  
12:02:55 5 when they might have been deployed a different  
12:02:58 6 way in the but-for world.

12:02:58 7 Q. And in your but-for world which  
12:03:00 8 we are going to come to in some detail, Terra  
12:03:04 9 Firma Funds 2 and 3 would not have invested in  
12:03:07 10 EMI; correct?

12:03:10 11 A. That's correct.

12:03:11 12 Q. There would have been funds  
12:03:12 13 available to them to make alternative  
12:03:14 14 investments between May of 2007 and the  
12:03:17 15 present; correct?

12:03:18 16 A. Yes.

12:03:21 17 Q. Is it your testimony that had the  
12:03:23 18 funds not invested in EMI in your but-for  
12:03:28 19 world, they would have realized a return of  
12:03:31 20 43.66 percent on alternative investments  
12:03:35 21 between May 21, 2007 and the present?

12:03:38 22 MS. DYER: Objection to the form.

12:03:41 23 A. I'm not making that prediction as  
12:03:44 24 such. What I'm doing is saying that a good  
12:03:47 25 measure of the likely expected performance is

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12:03:52 2 the past performance.

12:03:54 3 Q. Right. Is that your experience in  
12:03:55 4 the marketplace that past performance dictates  
12:03:57 5 future performance?

12:04:00 6 MS. DYER: Objection to the form.

12:04:02 7 A. Amongst private equity funds? If  
12:04:06 8 you look at the private equity funds as a  
12:04:08 9 degree of past dependence, I mean in venture  
12:04:12 10 capital, Kleiner Perkins has continued to do  
12:04:16 11 very well. That what people tend to look at  
12:04:20 12 is, you know, the historic performance,  
12:04:22 13 recognizing of course it is not a perfect  
12:04:24 14 predictor, but what tends to attract new money  
12:04:29 15 in is past performance.

12:04:32 16 And the ones that have performed  
12:04:36 17 are well are very hard to get into.

12:04:38 18 Q. Have you analyzed the actual  
12:04:40 19 performance of Terra Firma in investments other  
12:04:42 20 than EMI between May of 2007 and the current  
12:04:48 21 date?

12:04:48 22 MS. DYER: Objection, asked and  
12:04:53 23 answered.

12:04:53 24 A. No. I haven't done a specific  
12:04:55 25 analysis. I have looked at the cash in and

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12:04:57 2 cash out through the time period that I've  
12:05:03 3 identified and shown here.

12:05:04 4 Q. Again, just so I try to get an  
12:05:07 5 understanding of what you did with some  
12:05:09 6 precision, and we don't have a dispute about it  
12:05:11 7 later, is it your testimony that had Terra  
12:05:17 8 Firma Funds 2 and 3 not invested in EMI, they  
12:05:21 9 would have earned 43.66 percent between May  
12:05:25 10 2007 and June of 2010, can you answer that yes  
12:05:33 11 or no?

12:05:33 12 MS. DYER: Objection to the form.

12:05:33 13 Asked and answered twice.

12:05:34 14 A. I don't think I can add more to  
12:05:36 15 what I've already said.

12:05:39 16 Q. You are not capable of answering  
12:05:40 17 that question on a yes or no basis?

12:05:44 18 MS. DYER: Objection to the form of  
12:05:45 19 that question.

12:05:47 20 A. Is it different from the earlier  
12:05:49 21 questions you put to me.

12:05:50 22 Q. I am waiting for a yes or no  
12:05:51 23 answer. I think we both know --

12:05:53 24 MS. DYER: Objection.

12:05:54 25 Q. Let me ask the question one more

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12:05:55 2 time. If you can't answer it yes or no we will  
12:05:57 3 just wait until we see Judge Rakoff and get a  
12:06:00 4 yes or no answer at trial.

12:06:01 5 Are you offering an opinion that  
12:06:04 6 between May 21, 2007 and June of 2010 had the  
12:06:09 7 Terra Firma Funds 2 and 3 not invested in EMI  
12:06:13 8 they would have earned 43.66 percent as a  
12:06:16 9 return in that time period?

12:06:18 10 MS. DYER: Objection to form.

12:06:20 11 Asked and answered.

12:06:23 12 A. I am telling you the best measure  
12:06:24 13 of lost profits damages is what they earned in  
12:06:27 14 the past.

12:06:27 15 Q. Could you answer my question yes  
12:06:29 16 or no?

12:06:30 17 MS. DYER: Objection to the form.

12:06:32 18 If you can't answer it yes or no, you  
12:06:33 19 can't answer it yes or no.

12:06:34 20 A. I have given you what I've done  
12:06:37 21 and the best answer I can to your question.

12:06:41 22 Q. You're absolutely not capable of  
12:06:43 23 answering that question with a yes or no?

12:06:45 24 MS. DYER: Objection to the form.

12:06:46 25 Q. Under oath?

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12:13:52 2 the co-investors imply anything about the  
12:13:55 3 equity value of EMI in January of 2008?

12:14:01 4 MS. DYER: Objection to the form.

12:14:03 5 A. Did they imply anything about the  
12:14:05 6 equity value? I think they did endeavor to  
12:14:14 7 forecast what the expected future prospects  
12:14:20 8 would be.

12:14:21 9 Q. Do you know who prepared those  
12:14:23 10 co-investor presentations?

12:14:26 11 A. I believe Terra Firma did.

12:14:28 12 Q. Do you know how the equity value  
12:14:30 13 set out in Terra Firma's own equity -- own  
12:14:34 14 presentations to potential co-investors  
12:14:37 15 compared to Ms. DeMario's valuation of the  
12:14:39 16 equity of EMI?

12:14:44 17 A. I think they were above.

12:14:46 18 Q. Do you know?

12:14:47 19 A. Yes. I'm certain they were.

12:14:52 20 Q. Is it your testimony those  
12:14:53 21 presentations are unrelated to fair market  
12:14:55 22 value?

12:14:58 23 MS. DYER: Objection to the form.

12:15:04 24 A. I don't think they purported to  
12:15:05 25 measure fair market value in the sense that --

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12:15:11 2 in the typical definition and in the sense that  
12:15:13 3 was used -- definition that was used by  
12:15:15 4 Ms. DeMario.

12:15:22 5 Q. Go to Exhibit 4A please, May 2007  
12:15:28 6 values. Do you see that, value of EMI equity  
12:15:31 7 received by TFCP funds as of May 2007?

12:15:34 8 A. Yes.

12:15:34 9 Q. I don't want to belabor this. I  
12:15:36 10 just want to make sure we are being complete.

12:15:38 11 Would you agree with me that the  
12:15:40 12 implied value of the EMI equity received by the  
12:15:43 13 TFCP funds in May 2007 is based on calculations  
12:15:48 14 solely performed by Ms. DeMario?

12:15:53 15 A. The input, you know, if you're  
12:16:05 16 asking where the lines A and B came from  
12:16:09 17 Ms. DeMario's report, the answer is yes.

12:16:11 18 Q. Okay. Well let me then --

12:16:13 19 A. A, B and C in fact.

12:16:16 20 Q. A, B and C, G, H and I; isn't  
12:16:21 21 that correct?

12:16:28 22 Let's do it line by line, I don't  
12:16:31 23 think it will take that long, the fair market  
12:16:33 24 enterprise value reflected on line A of  
12:16:36 25 Exhibit 4A that was calculated by Ms. DeMario;

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12:16:39 2 correct?

12:16:39 3 A. Correct.

12:16:39 4 Q. Not independently verified by

12:16:41 5 you; correct?

12:16:41 6 A. Correct.

12:16:41 7 MS. DYER: Objection to the form.

12:16:42 8 Q. The gross debt outstanding post

12:16:44 9 acquisition number in line B, that is not a

12:16:46 10 number you verified independently; correct?

12:16:49 11 MS. DYER: Objection to the form.

12:16:53 12 A. Correct.

12:16:53 13 Q. The implied value of EMI equity

12:16:55 14 received by the fund in May of 2007 for Terra

12:17:01 15 Firma Capital Partners 2 and 3 that are set out

12:17:03 16 in line G and line H are numbers that are based

12:17:07 17 entirely on Ms. DeMario's calculation; correct?

12:17:10 18 A. That is correct.

12:17:12 19 Q. Similarly line I, total EMI

12:17:15 20 equity owned by the TFCP funds is a number

12:17:18 21 calculated solely by Ms. DeMario and not very

12:17:20 22 you filed by you; correct?

12:17:22 23 MS. DYER: Objection to the form.

12:17:32 24 A. It is based on, as I made clear,

12:17:33 25 on the data and calculations provide to me by

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12:17:39 2 Ms. DeMario.

12:17:40 3 Q. If we go to Exhibit 4B the  
12:17:43 4 present value of EMI equity owned by the TFCP  
12:17:46 5 funds, you have not personally, nor has anyone  
12:17:48 6 on your staff done a valuation of the current  
12:17:53 7 value of EMI equity; correct?

12:17:55 8 A. That is correct.

12:18:01 9 Q. If we turn next to attachments E,  
12:18:08 10 sir. These are the same series of damage  
12:18:09 11 calculations using August of 2007 values. Do  
12:18:12 12 you see that, it follows right after Exhibit,  
12:18:17 13 Attachment D is Attachment E.

12:18:26 14 MS. DYER: I can probably turn to  
12:18:30 15 it. I think you're in it. But I will  
12:18:34 16 just verify it. Here we are Attachment E.  
12:18:37 17 You did say E as in elephant?

12:18:39 18 MR. COHEN: E.

12:18:40 19 Q. These are the August 2007  
12:18:42 20 valuation dates, do you see that, sir?

12:18:44 21 A. Yes.

12:18:44 22 Q. Again I would like to try to do  
12:18:46 23 this in a truncated way unless we can't.

12:18:49 24 Do you do the same calculations  
12:18:52 25 as of August 2007 in Attachment E that are set

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12:18:58 2 out for May of 2007 in Attachment D?

12:19:02 3 A. Yes. The mechanics are the same.

12:19:03 4 Q. Are all the equity values as of

12:19:10 5 August 2007 derived from calculations solely

12:19:14 6 performed by Ms. DeMario?

12:19:19 7 A. Well I received them from

12:19:20 8 Ms. DeMario. She may have had help. But I am

12:19:24 9 basing it entirely on Ms. DeMario, what she

12:19:26 10 provided me with.

12:19:28 11 Q. And have you done or anyone on

12:19:30 12 your staff done any independent valuation of

12:19:34 13 the equity of EMI as of August 2007?

12:19:37 14 A. No.

12:19:38 15 MR. COHEN: I think this is

12:19:39 16 probably a good time for a break.

12:19:40 17 MS. DYER: Okay.

12:19:45 18 VIDEOGRAPHER: The type is 12:20

12:19:46 19 p.m. Off the record.

20 (Luncheon Recess: 12:20 p.m.)

21

22

23 A F T E R N O O N S E S S I O N

24 1:11 p.m.

25

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2 DAVID J. TEECE,

3 resumed, having been previously duly sworn, was  
13:10:38 4 examined and testified further as follows:

13:10:38 5 VIDEOGRAPHER: The time is 1:11 p.m.

13:10:41 6 We are back on the record.

13:10:49 7 CONTINUED EXAMINATION BY MR. COHEN:

13:10:49 8 Q. Go back to your report, sir,

13:10:51 9 Exhibit 1. I will focus you on page 13,  
13:10:57 10 paragraph 38, and footnote 50. Do you see you  
13:11:11 11 are testifying here or your report sets out  
13:11:14 12 some information about due diligence?

13:11:15 13 A. Yes.

13:11:15 14 Q. If you look at footnote 50, you  
13:11:19 15 raise a company that says may be relevant to  
13:11:21 16 your analysis. You say in footnote 50 "I do  
13:11:25 17 not know which, if any data were provided to  
13:11:28 18 Premira that were not present in the data room  
13:11:30 19 or vice versa. This question may be relevant  
13:11:33 20 to my analysis if Premira had access to  
13:11:35 21 information that was materially important in  
13:11:37 22 its decision not to pursue an EMI acquisition,  
13:11:40 23 and that information had been excluded from the  
13:11:42 24 data room, any information on the details of  
13:11:45 25 that exclusion, and the basis on which it had

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15:24:51 2 of your but-for world depends upon the fact  
15:24:54 3 that no one would have bid after the failure of  
15:24:59 4 Terra Firma to bid?

15:25:00 5 MS. DYER: Objection to the form.

15:25:06 6 A. I believe that it is unlikely  
15:25:21 7 that there would have been a bid. I'm not  
15:25:23 8 saying it couldn't have happened. The key  
15:25:29 9 question is would Terra Firma, no matter what  
15:25:34 10 other folks did, the key question would Terra  
15:25:37 11 Firma have come in.

15:25:38 12 Let's suppose that Warner,  
15:25:40 13 hypothetically had come in, that wouldn't  
15:25:42 14 necessarily be a triggering event for Terra  
15:25:46 15 Firma. Because Warner is in a different  
15:25:48 16 strategic group.

15:25:52 17 Q. Did you look at any Terra Firma  
15:25:53 18 documents that suggested to you that Terra  
15:25:57 19 Firma was planning for the eventuality of a  
15:26:01 20 competing offer from Warner in May 2007?

15:26:03 21 MS. DYER: Objection to the form.

15:26:06 22 A. Depends what you mean by a  
15:26:07 23 competing offer. What do you mean by --

15:26:09 24 Q. What I mean was Terra Firma  
15:26:11 25 taking steps in May 2007 to increase its bid

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15:26:17 2 for EMI in the event that Warner came in with a  
15:26:20 3 bid?

15:26:21 4 MS. DYER: Objection to the form.

15:26:26 5 A. In the situation where Terra  
15:26:31 6 Firma had made a bid, it was recognizing that  
15:26:39 7 there could be some activity from Warner. But  
15:26:48 8 I believe Mr. Hands testified at the time he  
15:26:50 9 made the bid, he didn't expect there to be a  
15:26:52 10 bid from Warner.

15:26:55 11 But that there was some  
15:26:58 12 possibility there could be a bid from Warner  
15:26:59 13 subsequently.

15:27:01 14 Q. Are you relying on that  
15:27:02 15 testimony?

15:27:02 16 A. Am I relying on it?

15:27:04 17 Q. Yes.

15:27:04 18 A. I'm taking it into account, yes.

15:27:06 19 Q. Look at paragraph 153 of your  
15:27:08 20 report, page 40. Let me know when you're  
15:27:21 21 there. You say "The economic principles  
15:27:28 22 related to real option theory and auction  
15:27:31 23 theory discussed above support a conclusion  
15:27:33 24 that, but for the fraud, Terra Firma would have  
15:27:36 25 had strong economic incentives not to bid at

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15:27:40 2 the auction and not to place a subsequent  
15:27:41 3 binding offer for EMI in 2007. This conclusion  
15:27:44 4 is consistent with my understanding of Terra  
15:27:46 5 Firma's historical behavior and practices."

15:27:49 6 What's the basis for your

15:27:50 7 conclusion -- what's the basis for your

15:27:54 8 understanding of Terra Firma's historical

15:27:56 9 behavior and practices?

15:28:04 10 A. Conversations that my staff had

15:28:05 11 with Guy Hands. I think there is some

15:28:09 12 testimony as well, but it is mainly

15:28:13 13 conversations with Guy Hands.

15:28:15 14 Q. You didn't have any testimony

15:28:16 15 available when you wrote this report, did you?

15:28:18 16 A. Correct.

15:28:20 17 Q. What did your staff learn from

15:28:22 18 Mr. Hands about Terra Firma's historical

15:28:24 19 behavior and practices?

15:28:28 20 A. Well that was not uncommon for

15:28:31 21 Mr. Hands to walk a deal down.

15:28:33 22 Q. What deals?

15:28:43 23 A. I don't remember as I sit right

15:28:44 24 here. As I sit here right now.

15:28:46 25 Q. Can you point me to any document

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15:28:47 2 that you've seen that demonstrates the history  
15:28:51 3 of Terra Firma, quote/unquote, walking a deal  
15:28:54 4 down?

15:28:55 5 A. No.

15:28:56 6 Q. Is there any deal that you can  
15:28:58 7 testify to as you sit here today, I can only  
15:29:02 8 ask you about as you sit here today, in which  
15:29:04 9 Terra Firma walked a deal down?

15:29:05 10 A. I can't give you the names. But  
15:29:09 11 I do recall my staff discussing this with Guy  
15:29:13 12 Hands and like many other private equity  
15:29:18 13 players, I think he, you know, uses this  
15:29:23 14 technique with some frequency.

15:29:25 15 Q. Did your staff do anything to  
15:29:26 16 verify what Mr. Hands had to say?

15:29:29 17 MS. DYER: Objection to the form.

15:29:39 18 A. Can I have the question, please.

15:29:41 19 (The pending question was read as  
15:29:41 20 follows:

15:29:25 21 "Question: Did your staff do  
15:29:26 22 anything to verify what Mr. Hands had to  
15:29:28 23 say?"

15:29:42 24 A. They may have talked to other  
15:29:45 25 people in Terra Firma. I just don't recall as

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15:29:46 2 I sit here right now.

15:29:47 3 Q. Do you know of any person that  
15:29:50 4 your staff talked to other than Mr. Hands?

15:29:55 5 MS. DYER: Objection, asked and  
15:29:56 6 answered.

15:29:56 7 A. I don't remember. I think there  
15:29:57 8 might have, but I just don't remember as I sit  
15:29:59 9 here right now.

15:30:00 10 Q. They might have or you don't  
15:30:01 11 know?

15:30:01 12 A. I don't know.

15:30:03 13 Q. Look at paragraph 154. "I  
15:30:06 14 understand that as a firm that is often engaged  
15:30:08 15 in the acquisition of companies and other  
15:30:09 16 assets, Terra Firma has a practice of engaging  
15:30:12 17 in strategic behavior in an effort to obtain  
15:30:15 18 the most attractive price for the asset that is  
15:30:18 19 seeking to purchase."

15:30:19 20 Do you see that?

15:30:20 21 A. Yes.

15:30:20 22 Q. Is that unique to Terra Firma,  
15:30:22 23 that kind of strategic behavior?

15:30:24 24 A. No.

15:30:25 25 Q. You say "I understand that that

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15:30:26 2 strategic behavior includes Terra Firma's  
15:30:28 3 approach to bidding at auctions. Terra Firma's  
15:30:32 4 pricing of its indicative, intermediate and  
15:30:35 5 final offers to potential targets. Terra  
15:30:37 6 Firma's efforts to engage in extended  
15:30:39 7 negotiations with the aim of reducing the  
15:30:41 8 acquisition price over time and other similar  
15:30:44 9 tactics."

15:30:45 10 Do you see that, sir?

15:30:45 11 A. Yes.

15:30:46 12 Q. Have you seen any documents that  
15:30:47 13 relate to Terra Firma's approach of bidding at  
15:30:50 14 auctions?

15:30:50 15 A. No. That's usually very guarded  
15:30:55 16 and not something you want to write down.

15:31:00 17 Q. Who is the source of the  
15:31:02 18 information about the way in which Terra Firma  
15:31:05 19 prices its indicative, intermediate, and final  
15:31:08 20 offers?

15:31:11 21 A. My staff.

15:31:11 22 Q. What did they tell you?

15:31:17 23 A. That when they interviewed Guy  
15:31:21 24 Hands and went through some of his bidding  
15:31:22 25 tactics, that it included these approaches and

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15:31:26 2 these strategies.

15:31:27 3 Q. What was the strategy with  
15:31:28 4 respect to indicative, intermediate and final  
15:31:32 5 offers he told them about?

15:31:39 6 A. Well, I don't remember the  
15:31:39 7 details.

15:31:40 8 Q. Do you remember anything about  
15:31:42 9 the bidding strategies that your staff learned  
15:31:46 10 from Mr. Hands?

15:31:47 11 A. What I remember is that I  
15:32:00 12 explained what a walk down strategy was. And,  
15:32:09 13 you know, my staff had conversations with Guy  
15:32:11 14 Hands and they came away with the impression  
15:32:13 15 among the many things that Mr. Guy Hands did,  
15:32:16 16 that he would use similar tactics, as I would  
15:32:19 17 expect every good investment banker -- excuse  
15:32:23 18 me, every good private equity negotiator does.

15:32:27 19 Q. Can you tell me any deal in which  
15:32:30 20 Terra Firma used a walk down strategy to obtain  
15:32:37 21 an asset at a lower price than it otherwise  
15:32:39 22 would have?

15:32:41 23 MS. DYER: Objection, asked and  
15:32:41 24 answered.

15:32:43 25 A. As I sit here right now, no.

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